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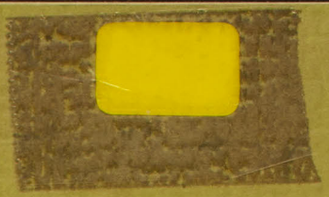
NEWMAN F.J. INTERVENTION IN DEFIANCE OF UNLAWFUL ARREST
POLICE v BLUEGUM



FELICITY NEWMAN

INTERVENTION IN DEFIANCE OF UNLAWFUL ARREST
THE POLICE V BLUEGUM

SUBMITTED FOR THE LL.B. (HONOURS)
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> [I]f a man without authority attempt to arrest another illegally, it is a breach of the peace, and any other person may lawfully intervene to prevent it, doing no more than is necessary for that purpose.[1]

I. INTRODUCTION

Last year the New Zealand High Court held that a third party is not justified in intervening in an unlawful arrest of another person. In The Police v Bluegum[2] the learned judge, Hardie Boys J., discussed the rights of an individual to resist his own unlawful arrest. The court found that there was clear authority in the Common Law of England and New Zealand to legally justify any reasonable assault he may commit while resisting.[3] The court refused, however, to recognise that this right may extend to a third party, stating that to accord such a right would be to "open the way to wholesale violence".[4] The defendant was accordingly convicted of assault.

As early as 1804[5] the bystanders right to intervene was firmly established at English Common Law. It is submitted that this right, to resist the unlawful arrest of another person, remains part of New Zealand law, and that

the Bluegum decision represents an unfortunate departure from this. Further, it is argued, that not to recognise the third party right on the grounds that it would be to encourage violence is to misconstrue the rationale of the right.

It is intended to provide a study of the Bluegum case that involves a discussion of the Common Law of New Zealand, and of other jurisdictions, and a consideration of policy factors in favour of recognising or rejecting any third party right.

II. THE BLUEGUM CASE

A. The Facts

The defendant, Bluegum, and his friend Williams were convicted in the District Court of both assaulting a constable in the execution of his duty, and of obstructing a constable in the execution of his duty, under Sections 76 and 77 of the Police Offences Act 1927.

Constables Borrows and Robinson were on uniformed night patrol. While investigating a complaint of assault, they stopped a vehicle corresponding with the description given by the complainant of the vehicle his assailants were in. The defendant and

Williams got out and met the constables alongside the vehicle when approached.

Constable Borrows asked them where they had been and where they were going. The defendant, in response, asked why they had been stopped and the reason for the questions. Told by Constable Borrows of the alleged assault, Williams denied any knowledge. He then asked if he was under arrest, and Constable Borrows said that neither of them was, but that he would like them to wait where they were until the complainant could come and identify them. Williams made it clear he was not prepared to stay and moved to get back into the vehicle.

To prevent him leaving both constables stepped between him and the car. Williams pushed them aside with his arm. According to Constable Robinson, Constable Borrows said, "you aren't going anywhere yet". Constable Borrows then stepped between Williams and the car once or twice more and each time was pushed aside by Williams, quite forcibly, so that the Constable was set back about four to five feet. Constable Robinson also seemed to have tried to block the way and was also pushed aside but with less force.

Constable Borrows purported to arrest Williams placing his arm on his shoulder. Williams pushed him away and, as Constable Borrows attempted to tip Williams over onto the ground, the defendant inter-

vened. Grabbing the constable from behind he told him to leave his mate alone. Constable Robinson subdued Williams on the ground, Constable Borrows doing the same with the defendant. Further police arrived, the defendant and Williams were handcuffed and removed to the police station.

Williams' assaults allegedly consisted of pushing both constables aside so that he could get to the car and perhaps of pushing Constable Borrows away as he sought to arrest him. The defendant's offences both seemed to stem from the one struggle with Constable Borrows.

On appeal to the High Court, Hardie Boys J. set aside both convictions entered against Williams and also the conviction entered against Bluegum for obstructing Constable Borrows in the execution of his duty. But the conviction for assaulting Constable Borrows in the execution of his duty was, however, amended by substituting for this offence one of common assault.

B. <u>The Judgement for Williams</u>

It is necessary to first consider the judgement for Williams since Bluegum's offence stems out of this confrontation and his rights will to some extent depend upon those Williams possesses.

The convictions against Williams were set aside because the court did not regard either constable as acting in the execution of his duty when they attempted to detain Williams against his wishes. It is an essential element of the offences of obstructing or assaulting a constable in the execution of his duty that the constable in fact be acting in such a manner when the alleged obstruction or assault takes place.

The court applied the approach taken in The Queen v Waterfield[6] in order to ascertain the nature of the police action. In this case the English Court of Criminal Appeal held that it was relevant to consider whether[7]

(a) such conduct falls within the general scope of any duty imposed by statute or recognised at Common Law, and

(b) whether such conduct albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.

In Bluegum, the appeal court found that the constables were acting pursuant to their duty to investigate an alleged crime in stopping the vehicle and checking its occupants, but that they went further than that by endeavouring to detain the vehicle and its occupants.

It is a fundamental principle of New Zealand law

that no man can be detained by the police unless he has been arrested.[8] Accordingly, the actions of the constables constituted an unjustifiable use of powers associated with their duty. In the opinion of Hardie Boys J., "they were in no different position from anyone else who places himself in front of a citizen to prevent him going where he wishes to go."[9]

Deciding in this way the court rejected an alternative approach taken by Talbot J. in Donnelly v Jackman[10] where it was held that[11]

> it is not every trivial interference with a citizen's liberty that amounts to a course of conduct sufficient to take the officer out of the course of his duty.

This interpretation was adopted by the New Zealand Supreme Court in Pounder v Police.[12] But the Bluegum court applied the Waterfield approach and held that by attempting to detain Williams short of arrest the constables were not acting lawfully.

Williams was justified in attempting to get to his vehicle. The subsequent arrest on the grounds that this constituted an obstruction was unlawful because the constables had precipitated the confrontation by unlawfully interfering with the rights of the citizen. In these circumstances, the court held, Constable Borrows could not claim to have reasonable cause to believe Williams had committed any offence. Apply-

ing Police v Anderson,[13] reasonable cause is to be objectively determined by the court and it does not matter that the constable may have honestly believed he had reasonable grounds to suspect a person of committing an offence.

In Williams' case there was held to be no grounds for convicting him of common assault as an alternative to the offences charged. He was justified in reasonably resisting the unlawful interference by the constables on the basis of self defence principles. Authority was clearly found for this proposition in Kenlin v Gardiner[14] and Rex v Rua.[15]

In Kenlin two schoolboys were visiting a number of premises reminding members of their school rugby team of a forthcoming match. They aroused the suspicions of two plain clothes police officers. When stopped and questioned the boys did not understand the warrant card shown to them, nor did they believe the men were genuine police officers. The boys tried to escape from the officer's hold by struggling and hitting the police officers.

On appeal against their convictions for assaulting a police constable in the execution of his duty the English High Court held that the justification of self defence was available, since there was a prior assault by the police officers. Taking hold of the boys amounted to a technical assault because it was

done in order to detain them for questioning rather than as an integral step of arrest. The resistance offered was of the nature of self defence and was therefore justified, there could be no conviction for common assault.

Similarly in the New Zealand case of Rua the Supreme Court held that where a constable sought to arrest a man by executing a warrant on a Sunday, the subject has a right to resist such an unlawful arrest. This right to resist allowed him to go to great lengths even to the extent of inflicting serious wounds in doing so.[16]

The defendant in Rua, resisted the unlawful arrest, calling upon his friends to assist him. His friends responded by killing the constable. On these facts Rua was held to have been entitled to call on his friends to rescue him and to invite them to use reasonable force in doing so.

Williams was entitled, the Bluegum court held, to use reasonable force himself to resist the unlawful execution of police authority. It is submitted that on consideration of the Common Law, the approach of the High Court on this point was entirely correct.

C. The Judgement Against Bluegum

Hardie Boys J. begins by stating that since he has

already held Constable Borrows to be acting outside his duty in purporting to arrest Williams, the intervention by Bluegum could constitute neither an obstruction nor an assault of a constable in the execution of his duty. The judge is clear, however, that even although Williams was entitled to resist his own unlawful arrest, Bluegum was not entitled to intervene to assist him. "[W]hat Bluegum did was nevertheless an assault. Was it justifiable?... I think not,"[17] The learned judge says.

In support of this view His Honour, Hardie Boys J., considers the English Court of Appeal decision The Queen v Fennell.[18] A father assaulted a policeman in order to rescue his son who he believed had been wrongfully arrested. The arrest was in fact lawful, and the court ruled that in these circumstances there could be no defence, based on a mistake of fact, to a charge of assaulting a constable in the execution of his duty.

The lower Fennell court had assumed that had the arrest in fact been unlawful, the father would have been justified in using reasonable force to secure his son's release. The acceptance of this proposition by the Court of Appeal[19] in Fennell, was acknowledged by Hardie Boys J., but the learned judge was correct in pointing out that the court was clear that it was not expressly deciding the validity of this proposition

since it had not been argued by counsel. This part of the Fennell judgement, which is directly relevant to Bluegum's situation, is easily distinguishable as mere dicta, the Court of Appeal seeming anxious to confine its judgement to the particular facts of that case and not to present any general statement of the law.

The Bluegum court quotes from the Fennell judgement the statement: "the law jealously scrutinises all claims to justify the use of force and will not readily recognise new ones."[20] This, Hardie Boys J., emphasises, was a warning from the Fennell court "to ensure the restriction rather than the extension of opportunity for violence."[21] The learned judge continues that it would, therefore, be consistent with this view to hold that there can be no extension of rights to justify third party interference in the unlawful arrest of another.

His Honour, Hardie Boys J., goes on to distinguish between two kinds of situation where a person is justified in using force in the defence of another. First, where the plea of self defence was available to anyone coming to the aid of an attacked person who was within the 'principle civil and natural relations', such as master and servant, parent and child, husband and wife. Second, is the 'general liberty', even as between strangers to prevent a felony.

It was upon this latter principle that the Court of

Criminal Appeal in The Queen v Duffy[22] based its decision. The facts of this case were that a sister attempted a rescue of a girl who was attacked. The court allowed a plea of justification where the sole purpose of the intervention was to restore the peace by rescuing the person being attacked. This justification derived from circumstances of necessity.[23]

Hardie Boys J. notes that Section 51 of the Crimes Act 1961 deals with the first self defence principle where a justification is accorded to reasonable actions of a third party who intervenes in order to rescue a person under his protection or where a special relationship exists between the parties.

Whether the second principle, adopted in Duffy, that intervention can be justified to restore the peace survives in New Zealand law is not clear, but His Honour Hardie Boys J. considers it unnecessary to decide since, even if it does he says, it is of limited application. It "may not be extended to a situation like the present where a policeman, without undue force, was attempting to effect an arrest which it now transpires was not justified."[24]

In support for his conclusion that there can be no third party right to intervene, Hardie Boys J., considers that to recognise such a right would be to encourage violence. It would unduly hamper police

and expose them needlessly to the increased danger of attack from friends and relatives in the hope that the arrest was unlawful.

The learned judge acknowledges that his finding that a third party has no right to intervene in the unlawful arrest of another person may appear to run counter to certain observations made by Chapman J. in Rua.[25] The implication that "had the friends come to the rescue, they would not have committed any offence either, provided they acted within reasonable bounds," in Rua Hardie Boys J. distinguishes. In Rua, he says, the court did not expressly decide that.

On His Honour Hardie Boys'J. part, "there is a great deal of difference between what one may do oneself to resist an unlawful arrest, and what others may do in coming to one's rescue."[26]

Even although counsel for the defendant argued that any conviction was a result of the unlawful activity of the police and that the defendant ought to be completely acquitted, Hardie Boys J. held that there was no need for Bluegum to interfere at all. He says "the law must not appear to give licence to assault the police whenever any dispute arises as to the exercise of their powers of arrest."[27] Accordingly, in the learned judge's view, full justice was done by convicting Bluegum of common assault.

III. CRITICISM OF THE CONSIDERATION OF COMMON LAW AUTHORITIES

A. Cases Cited in the Bluegum Judgement

His Honour Hardie Boys J. presents an extremely brief judgement regarding Bluegum's situation. In his learned opinion there is certainly no justification for Bluegum's intervention. Support for this he finds in the Fennell decision.[28]

1. Fennell

In this case the court was clear that to allow the defendant a justification based on a mistaken belief that the arrest of his son was unlawful would be an unwarranted extension of the law. It is doubtful whether this is itself a correct statement of the law.[29] It should be a defence for the defendant to show that he honestly believed the arrest was unlawful. Not to accord this mens rea defence where the arrest is in fact lawful is a failure to apply ordinary principles of the criminal law.[30]

An alternative approach is proposed by Glanville Williams,[31] whereby the Fennell court could have construed the mistake made by the defendant as a mistake of law. This traditionally does not amount to a legal justification since no-one is

supposed to take advantage from not knowing the law. If the defendant, in Fennell, was mistaken about the nature of the arrest because he was not familiar with the law of arrest then that would never be a defence.

The only way Fennell could have justified his actions by a mistake of fact construction would be to show that he believed "either that the officer did not suspect his son or that there were no facts that could give the officer reasonable grounds for suspicion... The evidence in this case," Williams says,[32] "fell far short of establishing such a remarkable frame of mind on the part of Fennell. The appeal could have been dismissed on that ground."

Glanville Williams describes the Fennell decision as an exceptional example of "judicial activism",[33] where, to escape from precedents, the Court of Appeal improvised a solution by drawing several distinctions for which there were no previous authorities.

The principle proposed in Fennell, that the law will not extend the opportunity for violence, was said in the context of refusing to accord the honest mistake of fact defence to a third party intervention. This is an essential point in re-

lation to the interpretation of the Fennell decision taken by Hardie Boys J. in Bluegum.

It is respectfully submitted that the Fennell court was indeed issuing a note of warning about encouraging violence, but this must not be used as authority to contract any rights accorded at law. The law ought to first, undertake an examination of its bounds before considering that to recognise certain rights would necessarily constitute an extension. In Hardie Boys' J. learned opinion it would clearly be an extension of the law to recognise any third party right, but this is an assumption for which, it is submitted, he fails to provide adequate support.

2. Duffy

The Duffy principle that a stranger may come to the aid of another person in order to prevent a felony, or to restore the peace, is rejected outright by Hardie Boys J. This principle, he believes, is simply not applicable where a policeman is attempting to effect an unlawful arrest.[34]

While His Honour decides that the constables were not acting in the course of their duty when they attempted to detain Williams and Bluegum, he does not consider that their actions could have constituted a breach of the peace. The learned judge

states that the Duffy principle can not apply where the constables have used no undue force in effecting their unlawful purpose. Nor can it apply, he says, where the unlawful nature of the arrest has only transpired at the time of the court's decision.

In Bluegum, the court prefers not to view the confrontation as one in which the constables are seen as the aggressors. Rather, the actions of the constables are construed as merely technically defective and it is the resistance provided by Williams and Bluegum which is viewed as the violent event.

There is authority in The King v Osmer[35] that an unlawful arrest alone amounts to a breach of the peace which any other person is entitled to intervene in order to prevent. The court in Bluegum might have enquired into what was the defendant's perception of the facts. If Bluegum was aware that what Constable Borrows was doing in attempting to detain them and then arrest Williams, was unlawful, then it might have appeared to him to be a situation where Williams was defending himself against unlawful actions. In Bluegum's eyes there may well have been a breach of the peace, since this arises where there is an actual assault, or where public alarm and excitement is caused by a person's unlawful act.

3. Rua

With regard to the legal position of Williams this judgement, Rex v Rua[36] was considered by Hardie Boys J. as persuasive authority that an individual may resist his own unlawful arrest, but His Honour was not prepared to find any authority in this decision that a third party may come to the rescue of such a person. Yet it is implicit that since Rua was entitled to call upon his friends to come to his assistance, they were indeed entitled to do so. The learned judge Hardie Boys J. dismisses the assumption made by Chapman J. as mere dicta.[37]

It is respectfully submitted that Chapman J. did not discuss the rights of third parties expressly, because calling upon others to rescue the arrested person was seen as an essential part of the right to resist the unlawful arrest of oneself. Upon an analysis of the Common Law authorities, not referred to by Hardie Boys J. in Bluegum, this proposition was so firmly established, both by case law and the learned opinions of text writers, that the position regarding third parties was clear. A right to intervene in order to rescue another person from unlawful arrest was seen by Chapman J. as existing at Common Law.

B. Cases and Authorities Not Referred to in Bluegum

The clearest historical expression of the third party right to intervene in the unlawful arrest of another person is found in The King v Osmer.[38] On an indictment for assaulting a constable in the due execution of his office, false imprisonment and rescue, it appeared that the defendant, while rescuing another person, assaulted the constable endeavouring to effect the arrest. The constable was in fact acting unlawfully since the warrant he acted upon was one which he could merely serve personally but not use to arrest.

Lord Ellenborough C.J. held[39]

> such indictment bad; it not appearing that [the constable] was an officer of the court: and that there could not be judgement after a general verdict on such a count as for common assault and false imprisonment; because the jury must be taken to have found that the assault and imprisonment was for the cause therein stated, which cause appears to have been that the officer was attempting to make an illegal arrest of another, which being a breach of the peace, the defendant might for ought appeared, have lawfully interfered to prevent it.

The defendant in Osmer was acquitted of assaulting

a constable in the execution of his duty, but he was not held liable for the lesser, included offence, of common assault. The court held that an unlawful arrest was a breach of the peace in which a third party could lawfully intervene to prevent, provided no more than reasonable force was used.

Traditionally, the right to resist unlawful arrest was part of the more general right to resist any unlawful process. This amounted to a reverse application of the strict ancient policy of according the highest protection to officers of the law who were acting within their powers. Unless the officer endeavouring to effect the arrest was acting in an exclusively legal manner the citizen was justified if he used violent means to resist the attack.

In Hawkin's Pleas of the Crown, the opinion of the law is that[40]

> since in the event it appears that the person slain were trespassers, covering their violence with a show of justice, he who kills them is indulged by the law, which in these cases judges by the event, which those who engage in such unlawful actions must abide at their peril.

The same view is taken by Chitty in A Practical Treatise on the Criminal Law, (1816),[41]

> if the warrant be, in itself, defective, if it not be enforced by a proper officer, or if it be executed out of the jurisdiction, without being backed by the proper magistrate, or the wrong person be taken under it, the party may legally resist the attempt to apprehend him and even third persons may lawfully interfere to oppose it, doing no more than is necessary for that purpose.

Sir James Fitzjames Stephens took the view that "an unlawful imprisonment may amount to such a breach of the peace as to entitle the bystander to prevent it by the use of force sufficient for that purpose."[42]

Modern support for the existence of the third party right to intervene in the unlawful arrest of another person is found in several texts. The English and Empire Digest[43] cites Osmer[44] as authority that this right exists, provided no more than reasonable force is used to rescue the person unlawfully arrested and to prevent that breach of the peace.

Also taken by L.H. Leigh, in his textbook Police Powers In England and Wales, is the opinion that "a person may use reasonable force to rescue another from unlawful arrest."[45] This rule is subject to the qualifications provided by Fennell[46] that[47]

> if the arrest is lawful, and if the only harm

> which the arrested person was in peril of was detention, the rescuer, if he assaults the constable will be liable for assaulting a constable in the execution of his duty. It is otherwise if the person arrested appears to be in peril of life and limb so that an immediate decision is required. A person who uses excessive force in resisting an unlawful arrest will be guilty of common assault.

The interpretation of the law provided by this writer is that there is a third party right to intervene and that an offence will only be committed should he use more than reasonable force.

Glanville Williams takes the view[48] that in England the normal right of self defence exists, even where the only object of the defendant is to avoid being arrested or detained. Further, he says, "on principle there is a right to rescue if the arrest is in fact unlawful."

Another learned writer states the Common Law principle in terms such that "if any physical force used by the defendant is in response to an unlawful act by the policeman then the defendant is guilty of an assault only if the force used is unreasonable."[49] This opinion does not seem to distinguish between those who resist their own unlawful arrest and, those who intervene to assist them. It is a general state-

ment of law that applies to all situations where the defendant responds to unlawful police activity.

Implicit in many other authoritive opinions is that there is always a distinction between what is done by a person in response to the lawful actions of a police officer and what is done in response to unlawful actions. In Halsbury's Laws of England it is stated that "any person who assaults another with intent to resist or prevent the lawful apprehension or detainer of himself or of any other person commits an offence..."[50] The position of third parties intervening to resist the unlawful arrest of another person is, unfortunately, not expressly considered in this respected text.

Authority that the current position at English Common Law is that a justification will be recognised for the reasonable actions of third parties intervening is found in Ludlow v Burgess.[51] In this case a constable in plain clothes was kicked in the shin while boarding a bus. As the accused started to walk away the constable put his hand on the accused's shoulder, not with the intention of arresting the defendant, but to detain him for further conversation and inquiries. The accused struggled and kicked the constable. Two other companions of the accused joined in the assault upon the constable. On appeal to the English High Court, Lord Parker C.J. set aside the

convictions against all the youths on the grounds that the detention by the constable short of arrest was an unlawful act and constituted a serious interference with a citizen's liberty.[52] In these circumstances they were held to be entitled to resist.

It does not seem that the judges in this case drew any distinction between the resistance provided by the first youth, the subject of the unlawful detention, and the intervention by his friends in order to assist him. The defendant's companions, who came to Ludlow's assistance, at all times acted as third parties, but they were completely acquitted. There was no suggestion that they could be alternatively liable for common assault in the same manner that the defendant in Bluegum was held to be.

It is respectfully suggested that these two cases have materially similar fact situations and that it is unfortunate that the Ludlow decision was not considered by His Honour Hardie Boys J. The Ludlow case provides a substantial basis for considering that there exists at English Common Law a third party right to intervene in order to rescue another person from unlawful arrest.

Had Bluegum come before the court just one year later, Hardie Boys J. would have been able to consider the effect of the recent Crimes Amendment Act 1980. Section 2 of this Act consolidates the three previous self defence provisions in the Crimes Act 1961 and presents a new section 48:

> Everyone is justified in using in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.

This provision would presumably operate to justify any assault Bluegum committed while assisting Williams defend himself. It extends to a third party the right to act in the self-defence of any other, not limited to those who enjoy a special relationship.

Further, the new self-defence provision provides for a mistake of fact defence. Should the arrest in fact be lawful, as in the Fennell case, but the defendant has acted under a belief that the arrest was unlawful and therefore the arrestee is acting in self-defence by resisting, a justification will nevertheless be accorded.

If the same construction is placed upon the nature of the resistance provided by the arrestee as in Bluegum, that is that s/he is acting in self-defence then a third party will clearly be justified in intervening in future cases.

It may be possible, however, for the courts to adopt the approach outlined earlier, (in Part II B), that detaining a citizen for conversation is a "trivial interference" which is not sufficient to render any subsequent arrest unlawful, to which the arrestee would not be entitled to resist in self-defence.

The new self-defence provision does seem to present consistent results with the cases and opinions discussed here, and only emphasises the apparently unsubstantiated conclusion that Hardie Boys J. reached in Bluegum.

The learned judge, could not of course make any reference to this recent legislation, but it is suggested that there was certainly an alternative approach provided by the Common Law to reach the same conclusion with regard to Bluegum's liability.

IV. COMPARATIVE LAW

A. United States

The English Common Law right to resist an unlawful arrest became the established rule in the United States during the nineteenth and early twentieth century.[53]

In Bad Elk v United States,[54] for example, the United States Supreme Court held that the defendant, whose murder conviction was reversed, had the right to use such force as was necessary to resist an attempted illegal arrest.

The traditional American position with regard to the intervention of bystanders is that a third party stands in the shoes of the person arrested and can resist if the latter might have done so. This rule was adopted directly from the English Common Law. In Commonwealth v Crotty[55] an officer attempted to exercise a warrant for the defendant's arrest that was void and defective on its face. The Supreme Court of Massachusetts held that the constable had no right to arrest the person on whom he attempted to serve it. He acted without warrant and was a trespasser. The defendant had a right to resist by force, using no more than was necessary to resist the unlawful acts of the officer. Any third person was held to be lawfully entitled to intervene to pre-

vent an arrest under a void warrant, doing no more than is necessary for that purpose.

The court cited The King v Osmer[56] and Chitty's Criminal Law[57] as authorities for the right of third parties to intervene in the unlawful arrest of another person.

More recently, however, rights to resist unlawful arrest have been greatly criticised, and have become "part of the passionate political debate over 'law and order'." [58] Several states have legislated against according any such rights both against intervention from a third party and against resistance provided by the subject of the unlawful arrest himself. These states[59] have followed the recommendations made by Section 5 of the Uniform Arrest Act[60] and S.304 (2) (a) (i) of the American Model Penal Code[61] and have effectively abolished the right to resist arrest whenever the actor knows the arrest is being made by a peace officer, even although the arrest is unlawful.

In addition to legislating against rights to resist unlawful arrest, several State and Federal judges have also condemned the right.[62] But, in modern American decisions on the question of resisting unlawful arrest, courts from a variety of jurisdictions have applied or recognised the traditional Common

Law rule, and held that a person may resist an unlawful arrest with the use of reasonable force.[63]

Other courts in a few jurisdictions have modified their position. Adopting the rule that a private citizen may not use force to resist a peaceful arrest by one he knows, or has good reason to believe, is an authorised peace officer performing his duties, regardless of whether the arrest is illegal in the particular circumstances.[64] Accordingly no right is recognised to intervene to resist unlawful arrest in these jurisdictions in the Bluegum situation since there is no doubt that the defendant's in Bluegum were aware that the arrest was being effected by a constable.

The law in the United States is divided between those jurisdictions which recognise a right to resist unlawful arrest and those which recognise no rights to resist arrest, regardless of its illegality. There is a further division among those states which do recognise a right to resist unlawful arrest. This is between those states that extend this right to third parties, upon intervention, and those that limit the application of a justification to the party that is himself the subject of the unlawful arrest.

Examples of where the right to resist have been ex-

tended to third parties are such cases as People v Briggs[65] and People v Papp[66].

In Briggs, the New York Supreme Court held that "one is privileged to resist illegal arrest, even by police officers, provided that the force or violence utilised is not more than is reasonably sufficient to prevent such arrest".[67] In this case a father was acquitted of a charge of assault in second degree violation of Penal Law Section 242, subd.5, while he was in the course of resisting the unlawful arrest of his son.

But in 1973, the Missouri Court of Appeals expressly considered the rights of third parties to intervene in order to resist the unlawful arrest of another person. In The City of St. Louis v Treece[68] a father intervened in the arrest of his wife and child. The court held that, even if the police officer's arrest of the defendant's wife and child had been illegal, the defendant had no right to interfere except where the officer is using unreasonable and unnecessary force to effect the arrest.

This position had earlier been adopted by the United States Court of Appeals in United States v Vigil[69] and in United States v Heliczer.[70] The court in these cases held that a bystander has no right to intervene if there is reason for him to be aware that the arrest is being made by a peace officer.[71]

The consistent thread through the American judicial decisions and the opinions of commentators is, however, their agreement that the traditional American position of third parties who intervene as standing in the shoes of the arrested person, is a right derived from the Common Law.

Reynolds J. in Briggs states,[72] "appealants in turn are supported... by the long history of decisions countenancing resistance to an unlawful arrest," and here he is referring to both defendants, including Brigg's father who came to his assistance by intervening in his unlawful arrest.

It is the conflicting opinions about whether the right to resist is appropriate to modern conditions which is the basis for the judicial disagreement in the United States. It is not a result of a disagreement that these rights ever existed at Common Law. And even although, to say that there is a trend toward limiting the right of resistance to illegal arrest[73]

> is true, in the sense that the common-law rule has recently been modified in some jurisdictions; it is not true that the common-law rule has been abandoned more often than upheld in the modern cases.

B. Canada

Canadian criminal law accords the right to resist unlawful arrest to those who are themselves the subject of the unlawful arrest. In this respect, the English Common Law position is clearly adopted. If a constable is not making a lawful arrest then the arrestee is entitled to resist such an arrest.[74] In Rex v Hastings the New Brunswick Court of Appeal held that "if the police officer making an arrest had no right to make the arrest without a warrant the citizen has a right to resist the arrest. He is entitled to retain his freedom."[75]

This approach was adopted in Koechlin v Waugh[76] where Laidlaw J.A. for the Ontario Court of Appeal said the defendant had been unlawfully arrested since he was not informed of the reason for his arrest and in these "particular circumstances he was entitled to resist the efforts of the police officers and they have failed in this case to justify their actions."[77] In this case the unlawfully arrested person was held to be entitled to damages as compensation for the unlawful actions of the police officer.

In Regina v Stenning[78] the Supreme Court of Canada applied the law as it was interpreted in the English case The Queen v Waterfield.[79]

> Thus, while it is no doubt right to say in general terms that police constables have a duty to prevent crime and a duty, when crime is committed, to bring the offender to justice, it is also clear from the decided cases that when the executing of these general duties involves interference with the person or property of a private person, the powers of constables are not unlimited.

These cases were applied in Regina v Turnbridge[80] where the court held the defendant legally justified in resisting the unlawful interference by the constable with his person.

The right to resist unlawful arrest extends only to such of the defendant's actions as are reasonable in the circumstances. Any excessive force used will incur liability for the included offence of common assault[81] where the charge is brought under Section 246 (2) (a) or (b) of the Canadian Criminal Code 1953, assaulting a peace officer engaged in the executing of his duty.

Canadian law with regard to the rights of the person unlawfully arrested is consistent with the approaches taken by both the British and New Zealand courts.

The Canadian courts in recent times have, however, tended to view the third party situation as one involving different considerations.

In Regina v Saunders,[82] the Appeal Division of the Nova Scotia Supreme Court held that it was obstructing a peace officer in the execution of his duty, to intervene in the unlawful arrest of another person. The accused attempted to intervene in the arrest of his friend Hooper, who was never informed of the reason for his arrest. The unlawful nature of the arrest, the court held, justified any reasonable resistance offered by Hooper without making him liable to a charge of assaulting or obstructing the officer, but this privilege of resistance could not be extended to the accused.

Cooper J.A., on behalf of Mackeigan C.J.N.S. and Coffin J.A., said that[83]

> the invitation of counsel for the [accused] to extend the privilege of resistance enjoyed by Hooper under the circumstances here present, to the [accused] is one which I refuse to accept. No authority was cited to us in support of such an extension and I cannot conceive of the existence of such authority. Any rights of resistance possessed by Hooper was his and his alone... The [accused's] action must in my opinion be considered separate and apart from the question of a possible invalid arrest of Hooper.

The accused was subsequently convicted of obstructing

a peace officer in the execution of his duty. Had he assaulted the constable, while intervening in the unlawful arrest of Hooper, the conviction would possibly have been one of assaulting the constable in the execution of his duty since this judgement maintains that as far as the accused was concerned, the constable, while endeavouring to unlawfully arrest Hooper, was nevertheless held to be acting in the execution of his duty. Had the Bluegum case been before this court, the judges may have indeed held Bluegum liable for not merely common assault, but for assaulting a constable in the execution of his duty.

It is respectfully submitted that the decision of this court in Saunders can be criticised. In Regina v Slipp[84], decided several years earlier, two constables entered the defendant's property in order to check the driver's licence of his son who they suspected of driving while intoxicated. The New Brunswick Supreme Court held that since the constables had no right to request the son's driving licence, his subsequent arrest for failure to produce it was unlawful and the defendant who intervened, obstructing the constable endeavouring to effect this arrest, was held to be not liable of obstructing a constable in the execution of his duty.[85]

The opinion of the court in Slipp is that a constable unlawfully arresting another person is not acting in

the execution of his duty. But the view of the court in Saunders was that this was not the case at law, and that a constable executing the unlawful arrest of another person is acting in the execution of his duty as regards the intervening third party.

The charge against the defendant in Slipp was obstructing a constable in the execution of his duty, and since there is no included offence as there is in assaulting a constable in the execution of his duty, the defendant had to be completely acquitted. This case, unfortunately, does not provide any interpretation of the Bluegum situation, where the defendant, although acquitted of assaulting a constable in the execution of his duty, was nonetheless convicted of common assault.

Further discussion of the Canadian position with regard to intervention by third parties is found in the case of Schultz and Schultz v The Queen[86]. The facts of this case were that two brothers were stopped in a car by a police constable who formed the opinion that Sylvester Schultz, the driver, was impaired by alcohol and demanded a sample of breath. He told Sylvester to get into the police car to be taken to the detachment office, and he told Rodney Schultz, whom he also believed to be unfit to drive, to accompany him. During the journey both brothers became abusive and threatening; the constable stopped the car, got

out and tried to put handcuffs on Rodney in order to restrain him; Rodney resisted and a scuffle ensued during which Sylvester came to his brother's assistance and the constable was kicked and otherwise assaulted. At no time did he say that he was placing Rodney under arrest. Both were charged with assaulting a peace officer engaged in the lawful execution of his duties.

Maher D.C.J. in the Saskatchewan District Court held that[87]

> it cannot be said that the constable was at the time engaged in the execution of his duties as a peace officer; or that Rodney Schultz was required to submit to such restraint on his freedom.

The appeal was allowed, the conviction against Rodney quashed, but with regard to Sylvester, the judge held that the situation was not the same. He continues,[88]

> [t]his appealant was being transported to Humboldt for the purpose of supplying a sample of his breath for analysis. No attempt was made to restrain his freedom or to place him under arrest, but he took it upon himself to go to the assistance of his brother and assaulted Constable MacDonald by striking him at least once. While the constable may not have been engaged in the

> execution of his duties at the time of the assault and the facts will not support a charge under Section 246 (2) (a) the appeallant, Sylvester Schultz is certainly guilty of the included offence of common assault.

The opinion of this judge is that there is a right to resist the unlawful detention of oneself but no right of third parties to intervene in order to provide assistance in this situation. While the third party will not, at least in this case, be liable for assaulting a constable in the execution of his duty, he will nevertheless be liable for common assault.

How far this judgement represents the general Canadian position with regard to third party intervention is unclear. It would seem that the tendency is to interpret the law in a similar manner as that applied by Hardie Boys J. in the Bluegum case and accordingly not recognise a justification for the actions of a third party.

C. Australia

Australia similarly adopted the English Common Law position "that an illegal arrest being an assault, the person arrested may resist with a corresponding amount of force to that used in the assault."[89] In

adopting this approach, it has been said[90]

> that the Australian states and territories have endorsed the notion that unlawful interference with an individual's liberty is so reprehensible that it should be able to be challenged then and there by self help rather than just later by litigation.

The position regarding intervention by a third party in the unlawful arrest of another person does not seem to have been specifically considered by the Australian judiciary, and it is difficult to predict the approach the Australian courts would take if a case of this type came before them in the light of recent criticisms made about the right to resist unlawful arrest.[91]

V. QUESTIONS OF POLICY

The propriety of recognising rights to resist unlawful arrest in third parties, in particular, is an area where there has recently been controversy in several jurisdictions. In 1971 the English High Court in Ludlow[92] and the Court of Appeal in Fennell[93] considered those two situations where a third party offered resistance on behalf of another, yet the approaches were not entirely consistent.

The United States, also, is divided about the interpretation of the law most fit for its legal system, and Canada seems unwilling to accord any rights to a party other than the person subject to the unlawful arrest.

Adopting in principle the strong words of Lord Simonds in the House of Lords in 1947:[94] "[b]lind, unquestioning obedience is the law of tyrants and of slaves: it does not yet flourish on English soil," New Zealand courts appear willing to recognise a justification for the arrestee's reasonable defiance of unlawful arrest only.[95]

In order to rationalize these decisions it is intended to discuss the various policy considerations behind recognising or rejecting certain rights to resist unlawful process.

A. Reasons for According Rights to Resist

The traditional view that a citizen is justified in resisting an unlawful arrest is primarily based upon the opinion that an unlawful arrest is a serious interference with a person's liberty. In 1710 the court in The Queen v Tooley said: "it would be hard that the liberty of the subject should depend on the will of the constable."[96] Some 230 years later, Lord Simonds in the House of Lords said that[97]

> it is the right of every citizen to be free from arrest unless there is in some other

> citizen, whether a constable or not, the right to arrest him. And I would say next that it is the corollary of the right of every citizen to be thus free from arrest that he should be entitled to resist arrest unless that arrest is lawful.

The right to resist unlawful action is a firm expression of the civil libertarian values which form the basis of the English constitution. There are, however, competing needs, for example, to have an efficient and effective police force. The balance must be maintained by a strict definition of the bounds of police powers.

The English and New Zealand view, is that, any powers the police exercise need to be firmly based in either legislation or the Common Law.

An illegal arrest is an assault and battery[98] on the person arrested, and also amounts to a false imprisonment. Authority is found in Blundell v Attorney General, where McCarthy J. in the Court of Appeal said:[99]

> one fundamental rule of the common law which we have inherited as part of the British system of justice is that any restraint upon the liberty of a citizen against his will not warranted by law is a false imprisonment.

"To deny such person the right to resist in this

circumstance would be analogous," one American commentator has said,[100] "to stripping away the somewhat similar common law privilege of self-defence."

In addition, the right to resist unlawful arrest was historically imperative to the ultimate wellbeing of the victim of the unlawful process. Conditions of detention during the sixteenth and seventeenth centuries were so bad that often, a person in jail ran a real risk of dying of disease before trial since bail was almost impossible to obtain.[101]

Such extreme conditions may not be common in the jails of more modern times, and at worst the victim of an unlawful arrest can be very distressed, but will not usually be under any greater risks to life or limb. The Common Law courts, however, have still taken the view that a citizen ought not to be penalised for reasonably resisting an unlawful interference with his liberty. Resistance to unlawful authority is seen as a quite justifiable response.

If no right to resist unlawful arrest is accorded, then it would be contrary to justice that the victim be left without an alternative remedy. In New Zealand a civil action may be taken against the police by the victim of the unlawful arrest for false imprisonment.[102] Where, however, there are allegations that the unlawful arrest amounted to an assault or battery upon the arrested person, then it

is doubtful whether any civil claim for damages can be undertaken.

The Accident Compensation legislation effectively bars any proceedings for compensation arising, either directly or indirectly out of an injury by accident. The bounds of this prohibition are unclear, but it seems that even punitive, or exemplary damages taken in order to punish the official for his unlawful actions, may be barred where the action complained of amounted to an assault or battery, no matter how slight.[103]

The abolition of the Common Law right to compensation in this context may well leave the wronged person in some circumstances, without an effective legal remedy, and any civil remedy, should one exist, will be a costly and lengthy business, often not worth the trouble.

Further, the decision to resist is the 'work of the moment' rather than a decision in which the actor would engage in a contemplation of the alternatives available or even the consequences of undertaking the particular course of action chosen.

There may be some situations where it would only be applying principles of equity to accord a justification for a persons reasonable response to an unlawful

interference. Assume, for example, the following circumstances:

A loses her dog while exercising him late one evening. B, a plain clothes officer has been watching her as she quietly enters private gardens. He reasonably suspects that A is committing some offence. He approaches A, takes hold of her and without saying a word attempts to force her to accompany him.

The purported arrest is clearly unlawful; the officer has completely failed to identify himself and inform her of the reasons for the arrest. It is quite likely that in these circumstances A would respond by endeavouring to escape by assaulting the police officer. If this was the case, then most observers would feel it quite unjust to convict A of common assault. A justification for her resistance would be felt to be in order. This would be accorded by an English or New Zealand court.

A justification would also be accorded, it seems, if the arrest was unlawful because of a more technical defect. Suppose, in the example above, that B is uniformed, he identifies himself, explains his suspicions to A, and then arrests in an apparently legal manner. If the constable did not have the necessarily objective reasonable cause to suspect, then the subsequent arrest is unlawful. If A

attempts to escape, however, by assaulting the officer, it is more difficult to justify her response, and it does not accordingly, seem unfair to convict for common assault.

In this respect, the Bluegum court does not appear to distinguish between plainly unlawful arrests and those that are technically unlawful when recognising Williams' right to resist.

It may be a more fair solution to look at the overall nature of the confrontation including the arrestee's state of mind, and in this regard a type of compromise would be made by the courts depending upon the relevant circumstances.[104]

There may be circumstances involving the intervention by a third party which would equally merit justification. Suppose that in the first hypothetical:

A loses her dog while exercising him with C, her friend. While A is searching the gardens, C is looking in the park across the road.

C comes upon the police officer as he is seizing A and forcing her along with him without explanation.

A is greatly distressed and is calling for help while resisting herself. The police officer is countering with greater force.

What are C's rights?

According to the Bluegum decision if C intervenes in order to assist A exercise her right of resistance he will be guilty of a common assault. C may merely place a hand on the police officer intending to pull him away in order to question him about the circumstances of the seizure, yet if a scuffle ensues he will be liable for assault.

What C has done, in most opinions, is to respond to the unlawful arrest in an understandable manner. He has intervened with the sole intention of resisting what appears to him to be an outrageous affront to both himself and his companion.

If C uses excessive force in resisting the unlawful actions of the police officer, then a conviction for common assault, or a more serious offence is quite in order. But if he is drawn into the situation by his own moral outrage, intending not to assault the police officer, but to protect A and obtain some explanation from the police officer, then it would be an injustice to convict him of assault. If he in fact, kills the police officer in the knowledge that the arrest was plainly unlawful, then it may be that a provocation defence would be available to him.[105]

The third party right to resist would always be limited to fact situations where the third party intervenes for the sole purpose of rescuing the party arrested and not to 'join in the fight' or for

revenge against the police officer for some reason. To ascertain circumstances of this type would not be too onerous a task to impose on the courts since they are engaged in a similar exercise when applying the principles of provocation and self-defence.

Also to justify reasonable resistance by a third party would not be to "encourage violence"[106] but rather it would be a recognition of an expected response. Principles of self-defence are not withheld on the grounds that they operate to "encourage violence". A self defence justification does not exist to incite people to violence but to allow the law to respond to the mitigating elements within any confrontation. To recognize a justification for the reasonable resistance of a third party would not, it is respectfully submitted, be inconsistent with this reasoning.

B. Reasons Against

To some extent, there are equally compelling arguments for abolishing or limiting the Common Law justification for resisting unlawful arrest.

It has been urged that resisting is no longer suited to modern conditions. Today most jurisdictions have an objective professional police force, trained to apprehend and to overcome resistance. Policemen are easily identifiable so that wronged parties can

lay complaints and bring civil actions to aggrieve their feelings.

Resisting is an application of the concept of self help which is not an appropriate remedy in the unlawful arrest situation. Self help is only proper where no other remedy is available and immediate action is called for, but not, where the greatest danger a person is in is of being detained for a short while by the police, and where there will ultimately be alternative legal remedies.

It is argued that if citizens resist arrest their actions can only represent an escalation of force since a police officer is likely to respond by a greater use of force. In most cases reasonable resistance will not even secure a person's liberty, the police will ultimately subdue the arrestee who will, himself, perhaps have suffered some injury. Resisting does not prevent the arrest. One Australian commentator says that[107]

> "[a]fter all, he who resists an unlawful arrest almost always ends up, in the short run, under arrest and thus, like the person who submits, must litigate its legality later. All that his right to resist really achieves is an additional violent incident in an already violent society."

Others have said only the guilty resist anyway

because they have motive to, while innocent citizens have nothing to fear from arrest.[108]

Further, it is unrealistic to suppose that the citizen can successfully distinguish between an arrest that is illegal and one that is legal or wrong only for some technical rule. The law about arrest is so complex that it is unwise for anyone to offer resistance in the face of police action.

These arguments clearly apply equally to a bystander who takes it upon himself to enter the dispute. His interference will only add one more violent component to the confrontation.

Foster J., more than a century ago, was of the opinion:[109]

> wise and good men know that it is the duty of private subjects to leave the innocent man to his lot, how hard soever it may be, without attempting a rescue; for otherwise all government would be unhinged. Yet, what proportion doth the case of a false imprisonment, for a short time, and for which the injured party may have an adequate remedy, bear to that I have now put?

Arguments to this effect were plainly in mind when His Honour, Hardie Boys J., refused to accord any

justification for the assaults committed by Bluegum. Williams was entitled to act in self-defence, yet Bluegum was not justified in assisting him because that would "open the way to wholesale violence."[110]

VI. CONCLUSION

Indications of judicial disapprovement of third parties rights in an unlawful arrest situation issued from the English Court of Appeal in Fennell when the court refused to apply a mistake of fact defence in the circumstances of a lawful arrest. This apparent contraction of legal principle was, however, taken to its utmost in the New Zealand High Court decision The Police v Bluegum.

By denying any justification for the alleged assaults committed by Bluegum in order to rescue his companion from illegal arrest, it is respectfully submitted, His Honour Hardie Boys J., departed from a long tradition of Common Law principles.

Clear authority can be found in Osmer, Rua and Ludlow, that where an arrest or detention is unlawful, another person is justified in seeking to rescue the arrestee.

It might be that, in some opinions, the Bluegum decision reflected the most appropriate position with regard to the specific issue of third party intervention, but it is hoped that this position was the result of a compre-

hensive debate and not, as might in some eyes be suspected, a product of judicial expediency. Full justice, it is suggested, was indeed done to Williams, but whether the same can necessarily be said with regard to Bluegum is doubted.

The implications the recent self-defence legislation[111] will have on the position of a bystander, in Bluegum's situation, is yet to be discovered. It would appear that if the same construction is placed on the activity of the resisting arrestee, that is, s/he is justified by self-defence principles in resisting an unlawful arrest, then the reasonable actions of a third party who intervenes in order to assist will be justified by Section 48 of the Crimes Act 1961.

It is respectfully submitted that this would be the most equitable approach, and would accord with traditional Common Law. If the third party was not aware of the unlawful nature of the arrest then no defence ought to be recognised since the intervening party could not propose to have been acting, on the facts as he believed them to be, in the self-defence of another.

A future case of similar facts to Bluegum may as a result of this legislation provide a complete justification for a reasonable assault allegedly committed while in the course of resisting unlawful arrest. This will be without regard as to whether the actor was resisting as an arrestee or as a third party.

The Bluegum decision appears to be made in terms of very distinct principles. The learned judge is quite adamant that no justification can be accorded for Bluegum's actions even although there exists one for Williams' resistance.

It is hoped that a more comprehensive examination of social policy as well as the Common Law of England, New Zealand and of other jurisdictions has been provided in order to expand the discussion within this narrow issue.

Even although Bluegum suffered a small penalty in the form of a $50 fine, it is rather the principles of real justice that are at risk when he is penalised for challenging the unlawful exercise of police power. It is hoped that the citizens of New Zealand are not yet blind nor are they slaves to unquestioningly obey authority.[112]

Footnotes

1. The King v Osmer (1804) 5 East 304, 102 E.R. 1086, 1088.

2. (1980) Unreported, Nelson Registry, M.1805.

3. Ibid, 9. Authority for which was found in Kenlin v Gardiner [1967] 2 Q.B. 510 and Rex v Rua [1916] G.L.R. 658.

4. Supra n.2, 11.

5. Osmer supra n.1.

6. [1964] 1 Q.B. 164.

7. Ibid, 170.

8. Blundell v Attorney General [1968] N.Z.L.R. 341, 354. Where Turner J. said: "I know of no justification for the exercise of forcible restraint upon any citizen... save one - that he is arrested."

9. Supra n.2, 9.

10. [1970] 1 All E.R. 987.

11. Ibid, 989.

12. [1971] N.Z.L.R. 1080.

13. [1972] N.Z.L.R. 233, 244, 247, 248.

14. Supra n.3.

15. Supra n.3.

16. Supra n.3, 660.

17. Supra n.2, 10.

18. [1971] 1 Q.B. 428.

19. Ibid, 431.

20. Supra n.18, 431.

21. Supra n.2, 11.

22. [1967] 1 Q.B. 63, 67.

23. Ibid, 68.

24. Supra n.2, 11.

25. Supra n.3, 660. Chapman J. says: "He was entitled to call on his friends to rescue him and invite them to use force adequate to the occasion in so doing."

26. Supra n.2, 11.

27. Supra n.2, 12.

28. Supra n.2, 10, 11.

29. One commentator views the Fennell decision as representing an unfortunate departure from sound principles. In his opinion it would have been more logical in the circumstances to have held that there is no right to use force at all in such a situation, and that it is necessary to rely upon legal means to procure the release of the child. [1970] Crim. L.R. 581, 582.

30. Glanville Williams Textbook of Criminal Law (Stevens, London 1978), 468. He expresses the view that the Fennell decision seems anomalous to deny the operation of the usual mens rea principle in the circumstances of that case.

31. Idem.

32. Supra n.30.

33. Supra n.30, 467.

34. Supra n.2, 11.

35. Supra n.1.

36. Supra n.3.

37. Supra n.2, 11.

38. Supra n.1.
Several cases had indeed arisen before Osmer that involved third parties killing while attempting to rescue a person unlawfully arrested. In Hopkin Huggett (1666) kel. (J) 59, 1 Hale 465, 84 E.R. 1082 the defendants killed a constable who was illegally impressing a man into the army. The affray was 'on the sudden' since, immediate action was essential to secure the arrestees release. The law of provocation was, however, uncertain, but seven judges held that the killing could not be murder, and convicted instead of manslaughter while five were of the opinion it was murder. This case was later said to be authority that killing while resisting unlawful arrest was manslaughter since the unlawful arrest alone was sufficient provocation: The Queen v Tooley (1710) 2 Ld. Raym 1296.

It was not altogether clear in many cases, whether the charge was reduced to manslaughter because the unlawful arrest amounted to a provocation or whether the defendant was held to be legally entitled to resist the unlawful process but had used excessive force in doing so. Chevigny (infra n.53) views Tooley as authority that there exists a legal right to resist while Russel, On Crime (12th ed., Stevens, London, 1965) 447, says that in such a situation "the courts were generally ready to treat the case as one of homicide committed under such provocation as to reduce the crime from murder to manslaughter."

The different approaches are relevant because if the unlawful arrest is held to be evidence of provocation, (as it is in S.170 Crimes Act 1961), it will not operate as a defence outside the homicide context. If, however, there is said to be a legal right to resist, (for which cases such as Osmer, Kenlin, Rua etc. are authority), then reasonable actions will be justified and there will be no offence. The cases of Hugget and Tooley may be limited only to the provocation context and will not be of relevance in the Bluegum situation.

39. Supra n.1, 1086.

40. Hawkins Pleas of the Crown (Sweet and Maxwell, London, 1824) vol. 1, 103.

41. Chitty A Practical Treatise on the Criminal Law (Garland, reprint of 1816 ed., London 1978) 61.

42. J.F. Stephen Digest of the Criminal Law (8th ed., Sweet and Maxwell, London 1950) 217.

43. The English and Empire Digest (Butterworths, London, 1977) vol. 15, 1195.

44. Supra n.1.

45. L.H. Leigh Police Powers in England and Wales (Butterworths, London, 1977) 48.

46. Supra n.18.

47. Supra n.45.

48. Supra n.30.

49. D. Lanham "Arrest, Detention and Compulsion" [1974] Crim. L.R. 288.

50. (4th ed., Butterworths, London, 1976) vol 11, 561.

51. (1971) Crim. L.R. 238.

52. Idem.

53. Chevigny "The Right to Resist an Unlawful Arrest" (1969) 78 Yale L.J. 1128, 1131.

54. 177 U.S. 529, 44 L.Ed. 874, 20S.Lt. 729 (1900).

55. 87 Am. Dec. 669 (1865).

56. Supra n.1.

57. Supra n.41, 44, 61.

58. Chevigny, supra n.53, 1128.

59. At least: New York, Delaware, New Hampshire, Rhode Island, California, Illinois. Source; J. Linday "The Right to Resist Unlawful Arrest" (1976) 10 Akron L.R. 171, 177.

60. American Uniform Arrest Act, referred to 44A.L.R. 3d, 1078, 1089.

61. Model Penal Code Tentative Draft 8 (American Law Institute, Philadelphia, 1958) 18.

62. See for example:
People v Burns 198 Cal. App. 2d Supp. 839, 18 Cal. Rptr., 921 (1961);
State v Miller 462 P.2d. 421 (1969);
State v Koonce 89 N.J. Super 169, 214 A.2d. 428 (1965).

63. See for example:
State v Robinson 6 Ariz.App. 424, 433 P.2d.75, (1967);
State v Goering 193 kon. 307, 392 P.2d. 930, (1964);
People v Krum 374 Mich. 356, 132 N.W.2d 69, (1965);
State v Miller 253 Minn. 112, 91 N.W.2d 138, (1958);
People v Pitcher 9 App.Div.2d 1016, 194 N.Y.S.2d 337, (1959);
People v Tinston 6 Misc.2d 485, 163 N.Y.S.2d 554, (1957);
Columbus v Holmes 152 N.E.2d 301 (1958).

64. People v Curtis 70 Cal.2d 347, 450 P.2d. (1969);
People v Muniz 4 Cal. App. 562, (1970);
People v Cueras 16 Cal. App. 3d 245, (1971).

65. 25 App. Div. 2d. 50, 266 N.Y.S. 2d 546, (1966).

66. 185 N.Y.S. 2d. 907, (1959).

67. Supra n.65, 547.

68. 502 S.W.2d. 432, (1973).

69. 431 F. 2d. 1037 (1970).

70. 373 F. 2d. 241, (1967).

71. Ibid, 248 and Supra n.69, 1042.

72. Supra n.65, 549.

73. 44 A.L.R. 3d. 1078, 1081.

74. For adoption of this principle see:
Rex v Hastings (1974) 90 C.C.C. 150;
Regina v Cottam [1970] 1 C.C.C. 117;
Regina v Mitchell (1973) 13 C.C.C. (2d) 282;
Regina v Kelly [1970] 4 C.C.C 191;
Regina v Lascelles (1970) 2 C.C.C. (2d) 134.

75. Hastings ibid, 157.

76. (1957) 118 C.C.C. 24.

77. Ibid, 29.

78. [1970] 3 C.C.C. 145.

79. Supra n.6, 171.

80. [1971] 4 W.W.R. 77, 3 C.C.C. 303.

81. Regina v Corrier (1972) 7 C.C.C. (2d) 461. Where the defendant responded to the unlawful attempt by the constable to detain his vehicle with excessive force a conviction for common assault was entered.

82. (1977) 34 C.C.C. (2d) 243.

83. Ibid, 249.

84. (1970) 1 C.C.C. (2d) 275.

85. Ibid, 277.

86. [1974] 1 W.W.R. 269.

87. Ibid, 274.

88. Idem.

89. See: Regina v Tommy Ryan (1890) 11 L.R. (NSW) 171, 6 W.N. 162;
R. v Morrison (1889) 6 W.N. (NSW) 32;
Minster v McLiney (1911) V.L.R. 347.

90. R.W. Harding The Australian Criminal Justice System (2nd ed., Butterworths, 1977) 256.

91. Idem.

92. Supra n.51.

93. Supra n.18.

94. Christie v Leachinsky [1947] A.C. 573, 591.

95. See Blundell (supra n.8) and Rua (supra n.3).

96. Supra n.38, 1298.

97. Supra n.94.

98. Supra n.90, and Curtis v United States 227 A.2d 840, 842, (1966).

99. Supra n.8.

100. Linday, supra n.59, 180.

101. R. Smith "The Right to Resist Unlawful Arrest" (1967) 7 Nat. Res. J. 119, 122.

102. Blundell Supra n.8.

103. For fuller discussion see: D.B. Collin's "Proceedings for Punitive Damages in the Regime of Accident Compensation" [1978] N.Z.L.J. 158.

104. Further discussion of proposal see: A Parkin "Resisting Unlawful Police Action" [1979] New L.J.850.

105. See earlier discussion n.38.

106. Hardie Boys J. Bluegum, Supra n.2.

107. Supra n.90.

108. R. Watler "Some Proposals for Modernizing the Law of Arrest" (1951) 39 Calif. L. Rev. 96, 112 and Warner "The Uniform Arrest Act" (1942) 28 Va.L. Rev. 315, 330.

109. Quoted in Russell A Treatise on Crime and Misdemeanors (Garland, reprint of 1865 ed., London, 1979) vol 2, 848.

110. Supra n.2, 11.

111. See earlier discussion of text Part III B, 24.

112. See comment made by Lord Simonds in Christie v Leachinsky (Supra n.94).